

M.U. and FEDERATION REPORTS.**LOO CHIN SA v. PUBLIC PROSECUTOR.**

[App. Cr. Juris. (Callow, J.) March 8, 1948]

[N.S. — Cr. App. No. 23 of 1947]

*Motor Vehicles Commercial Use Regulations —
Regulation 6 — Contravening conditions of a permit.*

In charging a person with contravening a permit and for a special condition attached thereto, it is essential to require him to produce such permit, and if possible to have it before the Court.

Cases referred to :—

- (1) *Gifford v. Whittaker* (1942) 1 K.B. 501.
- (2) *Low Ah Seng v. Public Prosecutor* (1946) M.L.J. 48.
- (3) *Lee Lai Fong v. Public Prosecutor* (1946) M.L.J. 101.
- (4) *Dris bin Taib v. Public Prosecutor* (1940) M.L.J. 45.

MAGISTRATE'S APPEAL.*Appellant in person.*

Kilner (Federal Counsel) for the Respondent.

Callow, J. :— This is an appeal from the Court of the Magistrate, Jelebu, against the conviction and fine of \$100 imposed on the 20th of October, 1947, for the contravention of the Motor Vehicles Commercial Use Regulations.

There were originally two charges as follows :—

- (I) That you on/about 26.8.47 at 5.30 p.m. at Kuala Klawang, being the driver of a motor lorry No. N 1937 for carriage of goods only, did carry passengers in breach of the conditions of the licence thereof, and that you have thereby committed an offence punishable under Regulation 6 of the Motor Vehicles Commercial Use Regulations — G.N. No. 30 of 1.11.45.
- (II) That you on/about 26.8.47 at 6.30 p.m. at Kuala Klawang, did fail to stop your said motor lorry when so required by the Police and have thereby committed an offence under Regulation 9 and punishable under 13 of the M.V. (Driving Offences) Proclamation — G.N. No. 151/17.1.46.

A finding of not guilty was recorded in respect of the second charge because the prosecution failed to prove that the driver of the lorry was aware of the command to stop. It appears from the defence that the lorry was not halted by the Police until reaching Pertang Police Station, some 14 miles further on from Kuala Klawang.

The case for the prosecution consisted of the evidence of two Police Officers who saw the lorry pass Kuala Klawang Police Station carrying eight persons.

This is not enough. Regulation 6 referred to in the charge reads :—

Any person who uses or causes or permits to be used a motor vehicle for the conveyance of passengers for hire or reward or for the carriage of goods without a permit or in breach of the conditions attached to a permit or otherwise in contravention of these Regulations or who fails to comply with any of the conditions attached to a permit shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.

The charge is not well particularised, but I agree with the learned Federal Counsel that the accused was not misled, and that he appreciated the nature and detail thereof. The substance of the offence alleged was that the accused conveyed passengers in breach of the conditions attached to a permit.

Now it was essential for the permit and the attached conditions to have been before the Court below. I do not find this akin to the class of case which places upon an accused person the burden of proving the fact, such as in a charge of driving an unlicensed vehicle that it is for the defendant to satisfy the Court to the contrary. In charging a person with contravening a permit and or a special condition attached thereto, it is essential to require him to produce such permit, and to have it before the Court.

In this case nothing was produced. At the close of the prosecution all that had been adduced was the evidence of two Police Officers who testified that they observed the lorry pass carrying eight persons. The appellant was not identified as the driver, or as being one of those in the lorry. The evidence of the stopping of the lorry at Pertang is hearsay and inadmissible, albeit it suggests that a licence, which may be the same as a permit, did exist; indeed the Magistrate in his ground of Judgment refers to haulage permit No. 6406, but when or how he saw this I cannot know, for page 7 of the Appeal file gives a nil return of exhibits produced at the hearing.

It seems to me that this charge should have been framed alleging the commission of the offence at Pertang. Then the permit would have been tendered by the officer to whom the accused appears to have surrendered it on demand, and there would have been clear and direct evidence as to the number and status of those in the lorry. It is not, in my view, happy to embark on a prosecution of this nature relying solely on the evidence of two Police Officers who saw the vehicle pass through Kuala Klawang.

I am aware that this point of the non-production of the permit was not raised by the appellant. He is unrepresented, and rests on his petition, no doubt

prepared by some one on his behalf. Nor am I inclined to sacrifice justice in favour of a technicality. But I think it dangerous to sustain a conviction for contravening a condition unspecified in the charge, a condition not produced in the Court below, and on the evidence of two Police Officers who simply testify to the passing by of the vehicle containing eight persons. It may be that those persons continued on to Pertang, the prosecution witnesses do not even say the accused was in the lorry, much less that he was the driver.

For these reasons and in particular the non-production of the permit in the Court below, the appeal succeeds.

But I wish to go further, and for this purpose I shall assume the relevant permit had been tendered and admitted in the Court below. I am satisfied that in such cases the prosecution may proceed against the owner or the driver. I consider the charge in this case should have read:—

That you at.....hours on the 26th day of August, 1947, at Pertang, being the driver of motor vehicle No. N 1937 operating under Motor Vehicle Haulage Permit No. 6406, did carry.....passengers contrary to special condition 1 of the said permit, thereby committing an offence punishable by regulation 6 of the Motor Vehicles Commercial Use Regulations.

Now either the driver or the owner or both may be proceeded against. I think the charge would have to be against the driver for "using" *Gifford v. Whittaker*⁽¹⁾, *Dris bin Taib v. Public Prosecutor*⁽⁴⁾, while if against the owner for "causing" or "permitting" *Low Ah Seng v. Public Prosecutor*⁽²⁾, and *Lee Lai Fong v. Public Prosecutor*⁽³⁾.

Ground of appeal (e) discloses a misapprehension of the law. It reads:—

- (e) That the learned Magistrate was wrong in holding that a breach of the conditions of the Permit had been committed. The condition of the Permit authorising the operation of the said lorry, approves—besides the driver and attendant, the conveyance of the owners (or their employees) of the goods which are being conveyed thereon. A copy of the Permit is annexed hereto marked 'A'.

By special condition 5 the permit is *personal* to the owner in whose name it is issued; it is not transferrable; therefore should he hire or charter his vehicle to another he cannot pass the sanctions in the non-transferrable permit personal to himself. If the hirer wishes to carry employee-passengers, in accordance with special condition 1, he must obtain a separate permit. Indeed, reading carefully the permit it seems that the permit holder must be the driver. Condition 6 allows an attendant, but nowhere is there provision for a driver other than the permit holder.

Grounds (b), (c) and (d) concern findings of fact. The Magistrate believed the prosecution evidence that the lorry carried eight persons when passing Kuala Klawang, and I see no reason to disturb this. I mention this to emphasise that the appellant has in no way succeeded on the grounds of appeal filed by him. It is on the non-production of the permit that the appeal is allowed.

Conviction Quashed.

PEK TIN SHU & ANOTHER v. PUBLIC PROSECUTOR.

[App. Cr. Juris. (Evans, J.) April 28, 1948]
[Perak—Cr. App. No. 17 of 1948]

Societies Ordinance No. 11 of 1947, s. 13—Assisting in the management of an unlawful society—Form of Charge—Criminal Procedure Code, Ss. 152, 153, 154, 421 and 422.

In this case the Appellants were charged as follows:—

"That you between the middle of 1946 and 14.1.48 in Teluk Anson, assisted in the management of an unlawful society, to wit, TRIAD SOCIETY, and thereby you have committed an offence punishable under Section 13 Ordinance No. 11/47."

The appellants were represented by Counsel in the Court below and did not object to the form of the charge. The District Judge in convicting the appellants recommended that the appellants be banished.

In quashing the conviction Evans, J. held:

- (1) That when a charge, as a charge, is useless and where the accused, though he did not object to the form of the charge even though he was represented by Counsel, must have been seriously embarrassed and where it is manifest on the record that the Court was misled, then the conviction and sentence cannot stand.
- (2) That a District Judge has no power to recommend in his Judgment that a prisoner be banished and such a course is quite improper.*

Cases referred to:—

- (1) *Rex v. Edwards* (1913) 1 K.B. 287.
- (2) *Rex v. Johnson* (1945) K.B. 424.

MAGISTRATE'S APPEAL.

Evans, J.:—In this case the two appellants were found guilty of an offence which is set out in the charge as:—

"That you between the middle of 1946 and 14.1.48 in Teluk Anson, assisted in the management of an unlawful society, to wit, TRIAD SOCIETY, and thereby you have committed an offence punishable under Section 13 Ordinance No. 11/47."

They were charged together with another man, who was also found guilty but who has not appealed,

* It is respectfully submitted that it does not appear that there is anything objectionable in usual practice of recommending that consideration be given to the institution of banishment proceedings. *Ed. M.L.J.*